



Claimant requested the Appeals Board to review the single issue of the nature and extent of claimant's disability.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The nature and extent of claimant's disability was also the only issue before the Special Administrative Law Judge. The Special Administrative Law Judge's Award limited claimant to an 11.5 percent loss of use of his right upper extremity as set forth in the schedule of injuries contained in K.S.A. 1992 Supp. 44-510d(a)(13). Claimant contends that the Special Administrative Law Judge erred in limiting claimant's injury to his right upper extremity. Claimant asserts he has presented persuasive evidence in the record to entitle him to permanent partial disability benefits based on the work disability test contained in K.S.A. 1992 Supp. 44-510e(a).

The parties stipulated that claimant was injured while he performed repetitive work activities culminating on June 7, 1993, while employed by the respondent. The central dispute in this case is whether claimant's work-related injuries are limited to his right upper extremity or whether claimant also suffered a permanent injury to his right shoulder.

The respondent provided claimant with medical treatment for his right upper extremity problems primarily through orthopedic surgeon J. Mark Melhorn, M.D., who specializes in treatment of injuries to the hands and upper extremities. Dr. Melhorn first saw claimant on August 17, 1993, and diagnosed right carpal tunnel syndrome, right ulnar nerve wrist and elbow, right lateral epicondylitis, and right radial nerve elbow entrapment. After treating claimant conservatively without success, on September 13, 1993, Dr. Melhorn performed a right carpal tunnel syndrome release, right ulnar nerve at the elbow and wrist decompression with anterior transposition, and radial nerve elbow decompression with lateral epicondylectomy and conjoined tendon release. Claimant was followed by Dr. Melhorn until he met maximum medical improvement on October 26, 1993.

On the stipulated injury date of June 7, 1993, claimant was performing the job of deboning meat. This job required claimant to use a hook in his left hand and a knife in his right performing repetitive movements with both hands over an 8-hour work day. After claimant notified the respondent of his symptoms, he was moved to a lighter job while he received treatment from Dr. Melhorn. After Dr. Melhorn released claimant with permanent work restrictions, the respondent toured the claimant through the plant in an effort to find claimant a job that he could perform within those restrictions. The respondent was unable to find claimant a job within his permanent restrictions and on February 1, 1994, respondent terminated claimant's employment.

Claimant testified at the regular hearing held on May 21, 1996, that he was unemployed at that time because of a back injury he suffered while working for a construction company following his termination by the respondent. Claimant further testified that he continued to have pain and discomfort in both of his hands and his shoulders. Following his termination from the respondent, claimant testified he had drawn unemployment and had performed light work for a construction company for approximately one year. Furthermore, claimant established that his right hand became more symptomatic while he performed his repetitive work activities while employed by the respondent. Claimant also testified that while he was working for respondent his right shoulder also became symptomatic.

Respondent took the deposition testimony of James Michael Casey, a self-employed general contractor, located in Dodge City, Kansas. The claimant worked for Mr. Casey as a laborer for over a year commencing in June 1994 until claimant injured his back and was unable to do the construction work. Mr. Casey testified that claimant was required to perform heavy manual labor with both his hands and arms repetitively while he was employed by the construction company using hand tools such as a hammer, saw, shovel, and pick. Mr. Casey recalled that he questioned claimant at the time he was hired as to whether he had any physical problems that would keep him from performing construction work. Mr. Casey indicated that the claimant told him he did not have any physical problems. Mr. Casey also testified that claimant made no complaints about being unable to perform the repetitive and heavy construction work because of pain and discomfort either in his arms or his shoulders. Mr. Casey further testified that claimant was a good worker and did not miss work because of physical problems before injuring his back.

Three physicians testified by deposition in this case and all three expressed opinions on claimant's permanent functional impairment, permanent restrictions, and whether claimant suffered a permanent right shoulder injury while he was employed by the respondent. Claimant's treating physician, Dr. Melhorn, at the time he released the claimant after the claimant had reached maximum medical improvement on October 26, 1993, testified that he assessed a permanent functional impairment to claimant's right arm of 10.85 percent. The doctor permanently restricted the claimant to medium level work consisting of a single lift limited to 50 pounds, frequent lifts limited to 25 pounds, repetitive grasping, pushing, pulling, or fine manipulation limited to 6 hours or less per 8-hour working day and no working with hooks, knives, or scissors. Although the claimant made complaints to Dr. Melhorn of pain and discomfort in his right shoulder, Dr. Melhorn did not assess a permanent functional impairment to the claimant's right shoulder. Dr. Melhorn testified that he found the x-rays taken of the right shoulder showed no abnormalities and claimant's range of motion testing showed no apprehension, impingement, thoracic outlet syndrome, or crepitus in his right shoulder.

Administrative Law Judge Thomas Richardson appointed orthopedic surgeon, C. Reiff Brown, M.D., to perform an independent medical examination of claimant.

Dr. Brown examined claimant once on August 25, 1994. Dr. Brown testified that claimant had suffered a permanent injury limited to his right upper extremity and assessed a 12 percent permanent functional rating as a result of that injury. The doctor permanently restricted claimant to avoid frequent flexion and extension of the right wrist as well as the use of a knife in the right hand. Dr. Brown testified he repeatedly tested the range of motion of the shoulders of the claimant for possible crepitus because he had been informed that one of the physicians had examined the claimant and found crepitus present. Dr. Brown also found, from his examination, that the claimant had defused tenderness present in the right shoulder but did not find significant anatomical distribution to the tenderness or a trigger point component present. The doctor found no justification for assigning a permanent impairment to claimant's right shoulder.

Claimant's attorney had claimant examined and evaluated on December 10, 1993, by Aly M. Mohsen, M.D., board-certified in physical medicine. Dr. Mohsen testified he not only found claimant to have permanently injured his right upper extremity but also found claimant had sustained a permanent injury to his right shoulder. Specifically, Dr. Mohsen found, from the range of motion and palpation testing, crepitus in claimant's right shoulder. As a result, Dr. Mohsen assessed an 18 percent permanent functional rating to claimant's right upper extremity which included the right shoulder. The doctor converted this functional rating to a whole body rating of 10 percent. Dr. Mohsen did not have an explanation as to the reason why Dr. Brown and Dr. Melhorn had not found crepitus in claimant's right shoulder during their examinations. He did agree with Dr. Brown that crepitus is a permanent condition that does not go away over the passage of time. However, Dr. Mohsen testified that if a person is not working and therefore is using his shoulder less over a period of time that his symptoms would lessen but the crepitus would remain.

The claimant argues that his subjective complaints coupled with Dr. Mohsen's opinion that he suffered a right shoulder injury in addition to his right upper extremity injury is the most persuasive evidence in the record and entitles claimant to a whole body disability and, more importantly, a work disability.

The Appeals Board disagrees with the claimant and concludes the record as a whole fails to prove that it is more likely than not that claimant suffered a permanent injury to his right shoulder. Thus, the Appeals Board affirms the Special Administrative Law Judge's Award that limited claimant to a scheduled right upper extremity injury. In this case, the Appeals Board finds that greater weight should be given to the opinions of the treating physician, orthopedic surgeon Dr. Melhorn and the independent medical examination physician, orthopedic surgeon Dr. Brown, over the physical medicine physician Dr. Mohsen, who was hired by the claimant and saw claimant one time for purpose of assessing permanent functional impairment and permanent restrictions. Additionally, the Appeals Board finds it is significant that the record established that claimant performed heavy manual labor while working construction for over a year after he was terminated by the respondent without complaining of the pain and discomfort in his

hands, arms, or shoulders. Claimant then testified more than two years following his termination that he continued to have intolerable pain in his right hand, arm, and shoulder. Claimant also testified the work that he performed while he was working construction was light work. In contrast, Mr. Casey, the owner of the construction company, characterized the work as heavy manual labor. Accordingly, the Appeals Board concludes claimant's testimony was inconsistent and contradicted by an unbiased third party.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey dated November 21, 1996, should be, and is hereby, affirmed.

All remaining orders of the Special Administrative Law Judge contained in the Award are approved and adopted by the Appeals Board as if specifically set forth herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1997.

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BOARD MEMBER

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BOARD MEMBER

c: Stanley R. Ausemus, Emporia, KS  
D. Shane Bangerter, Dodge City, KS  
Wendel W. Wurst, Garden City, KS  
Kenneth S. Johnson, Administrative Law Judge  
Philip S. Harness, Director